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Supreme Court of the United States

October Term, 1975

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *Petitioner*,

v.

UNITED BROTHERHOOD OF CARPENTERS OF AMERICA, AFL-CIO-CLC, *et al.*

and

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *Petitioner*,

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

and

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Chamber of Commerce of the United States of America ("the Chamber"), on behalf of itself and its member Grinnell Corporation ("Grinnell"), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

ORDERS AND OPINIONS BELOW

The opinion of the court of appeals (Pet. App. pp. 1a-9a) [1] is not yet officially reported. The order of the district court (Pet. App. pp. 10a-11a) is likewise unreported.

[1] "Pet. App." refers to the appendices attached to the instant "Grinnell" petition.

JURISDICTION

The judgment of the court of appeals (Pet. App. p. 12a) was entered on July 29, 1975. On September 9, 1975, the court of appeals denied the Chamber's timely petition for rehearing (Pet. App. p. 12a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether any membership association can be required, consistent with the First Amendment right of freedom of association, to disclose the identities of its injured members through a discovery order as a condition to engaging in civil litigation on behalf of its members where standing requires the association to plead the injury of at least one of its members.

2. Whether an immediate appeal of a pretrial discovery order is appropriate under 28 U.S.C. § 1291 as an important question where the order infringes upon the rights of all membership associations to initiate litigation on behalf of their injured members.

3. Whether a writ of mandamus should lie where a pretrial discovery order violates freedom of association rights and the protective provision is inadequate to protect against widespread dissemination.

STATUTES AND RULES INVOLVED

The relevant provisions of the United States Constitution, the United States Code, 28 U.S.C. § 1291 and 28 U.S.C. 1651(a), and Rule 37(b) of the Federal Rules of Civil Procedure are set forth in the companion *Dow* petition.

STATEMENT

A. The Order of the District Court

The order of which review is sought arises from an action in which the Chamber,[2] as a plaintiff, has challenged the payment by the State of Rhode Island, through its Department of Employment Security ("RIESC"),[3] of employment compensation benefits to striking employees. On May 30, 1972, the Chamber filed a complaint for declaratory judgment and injunction on behalf of its injured member The Grinnell Corporation ("Grinnell"); a similar complaint was filed by Grinnell, one of the Chamber's members on May 15, 1972 (Pet. App. pp. 13a-18a). Together, the Chamber and Grinnell seek to have the district court declare invalid and enjoin the application of the Rhode Island Employment Security Act insofar as that statute authorizes the payment of unemployment benefits to striking employees (Pet. App. p. 17a).[4]

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[2] The Chamber is an association consisting of a membership of over 3,700 state and local chambers of commerce and trade and professional associations, a direct business membership in excess of 38,000, and an underlying membership of approximately 5,000,000 business firms and individuals. A number of the Chamber's members are employers subject to the Rhode Island Employment Security Act, 28 R.I.G.L. § 28-42-1 *et seq.* ("RIESA") which requires them to make contributions to the Rhode Island Employment Security Commission, and are, as well, subject to the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 151 *et seq.* ("LMRA") whereunder they are obligated to bargain collectively with the bargaining representatives of their employees.

[3] The Rhode Island Employment Security Commission is charged with the enforcement, operation and execution of RIESA and has applied RIESA so as to provide unemployment benefits to striking employees and to charge such benefits against the employers involved.

[4] Grinnell is an employer subject to RIESA and is, therefore, required to make contributions to RIESC. Grinnell is also subject to the LMRA and is required to bargain collectively with

The complaints allege that such state payments contravene federal labor policy by disrupting the scheme of free collective bargaining embodied in the National Labor Relations Act and, thereby, violate the Supremacy Clause of Article VI, Clause 2 of the Constitution of the United States (Pet. App. p. 15a).

On July 17, 1974, during the course of pre-trial discovery, the Steelworkers[5] served upon the Chamber a set of twenty-two interrogatories. The interrogatory at issue here ("interrogatory #1") requested the Chamber to identify those of its members who have been subject to the Rhode Island Employment Security Act at any time since January 1, 1968 (Pet. App. p. 20a).

On December 30, 1974, the district court, over the objection of the Chamber, issued its Memorandum Opinion which held that the Chamber must disclose the identity of those of its members who are subject to the Rhode Island Employment Security Act (Pet. App. pp. 31a-35a).[6] The district court rejected the Chamber's assertion of constitutional privilege because assuming the applicability of such a privilege, the Chamber waived any such claim by alleging the injury of its Rhode Island members in its complaint. The district court stated: "the door has been opened [by the Cham-

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the bargaining representative of its employees. Such benefits had in fact been paid at various times to striking employees of Grinnell during the course of strikes by the Steelworkers at some of Grinnell's Rhode Island facilities.

[5] The Steelworkers were granted leave to intervene on May 30, 1972. The Steelworkers are the certified bargaining representative of the striking employees of Grinnell.

[6] In addition, the district court held that the Chamber must respond to certain other Interrogatories. In accordance with that holding and the district court's subsequent January 15, 1975 order, the Chamber timely answered the Steelworkers' revised and amended Interrogatories.

ber] warranting answer to inerrogatory #1, so that the Steelworkers may inquire specifically as to these alleged injuries" (Pet. App. p. 32a). The district court ruled that the identities of the Chamber's Rhode Island members was "highly . . . relevant and should be answered" (Pet. App. p. 33a, p. 32a). On January 13, 1975, the court issued an order stating that the Chamber "shall answer" interrogatory #1 "no later than January 19, 1975" (Pet. App. pp. 10a-11a). The court issued a protective order which provides (Pet. App. p. 11a):

> Defendant-Intervenor United Steelworkers of America, AFL-CIO-CLC will not make use of the list of member firms which the Chamber of Commerce of the United States of America and the Greater Providence Chamber of Commerce must provide in answer to interrogatories or disclose the identity of such member business firms except for the sole purpose of defending this lawsuit and for no other purpose.

On January 20, 1975, the Chamber filed with the district court a Motion to Amend Order to Include Statement Prescribed by 28 U.S.C. § 1292(b), seeking certification to the Court of Appeals (Pet. App. p. 39a). That motion was denied and, on January 31, 1975, the Chamber filed a notice of appeal from the district court's discovery order (Pet. App. pp. 41a-42a).

B. The Decision of the Court of Appeals

The court of appeals concluded it had no jurisdiction under 28 U.S.C. § 1291 to hear an appeal of a discovery order, and suggested that the Chamber "can refuse to comply and seek review from the sanction, if any, imposed for that refusal." (Pet. App. p. 3a, p. 7a). The court conceded (Pet. App. p. 7a): "Admittedly there is less certainty as to whether an order

adjudicating a party in civil contempt would be [immediately] appealable (citations omitted)." With respect to the Chamber's reliance upon the All Writs Act as a basis for jurisdiction, the court ruled that the Chamber failed to meet its burden of showing "extraordinary circumstances" which would entitle it to mandamus. (Pet. App. p. 9a)

REASONS FOR GRANTING THE WRIT

The basic questions presented by this petition are the same as those presented in the same procedural setting in the companion *Dow* petition No. 75- , also filed this date. Accordingly, the reasons there advanced for granting a writ of certiorari to the Sixth Circuit are equally applicable here. In the interest of conserving the Court's time, these reasons will not be restated in this petition.

CONCLUSION

For the reasons set forth in the companion *Dow* petition, a writ of certiorari should be granted.

Respectfully submitted,

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September, 1975

APPENDIX

PETITIONER'S APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 75-1083

THE GRINNELL CORPORATION,
Plaintiff, Appellee,

and

THE CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA,
Plaintiff, Appellant,

v

MARY C. HACKETT, Director of the Department
of Employment Security of the State of Rhode Island
and JOHN J. AFFLECK, Director of the Department
of Social and Rehabilitation Services of the
State of Rhode Island,
Defendants, Appellees,

and

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC,
Intervenor, Appellee.

ON APPEAL FROM AN ORDER OF, OR ALTERNATIVELY ON
PETITION FOR WRITS OF MANDAMUS AND/OR PROHIBITION
TO, THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND
(RAYMOND J. PETTINE, *Chief Judge*)

Before COFFIN, *Chief Judge,*
McENTEE and CAMPBELL, *Circuit Judges.*

Opinion of the Court

(July 29, 1975)

McENTEE, *Circuit Judge*. The litigation spawning this appeal was initiated to test whether Rhode Island's provision of unemployment benefits to striking workers violated federal law. On our prior consideration of the case we remanded it for a more detailed evidentiary record. *Grinnell Corp.* v. *Hackett*, 475 F.2d 449 (1st Cir.), *cert. denied*, 414 U.S. 858 (1973). That command led to further pre-trial discovery, which in turn has produced this appeal. The plaintiff-intervenors, the Chamber of Commerce of the United States and of Greater Providence ("Chamber"), were served with interrogatories by the defendant-intervenors, the United Steelworkers of America, AFL-CIO ("Steelworkers"). The principal bone of contention is Interrogatory No. 1, which reads:

> "1. List the name, principal office address and Rhode Island address of each 'underlying' member business firm of the Chamber or of its affiliate, the Greater Providence Chamber of Commerce (hereafter 'Providence Chamber') who is now or who at any time relevant to this action has been an employer subject to the Rhode Island Employment Security Act. 28 R.I. G.L. § 28-42-1 et seq. (hereafter 'RIESA')."

The Chamber resisted answering this interrogatory, claiming that it sought constitutionally protected information, *see NAACP* v. *Alabama*, 357 U.S. 449 (1958), and that disclosure of the identities of the Chamber's member firms would subject them to violence, property destruction, and other forms of harassment and economic reprisal. On January 15, 1975, the district court ordered the Chamber to answer Interrogatory No. 1 and other contested interrogatories, but the order contained a protective provision barring use of the Chamber's disclosure for any purpose

other than defense of this lawsuit.[1] The Chamber appeals this order and, in the event we find no jurisdiction over this appeal, also seeks an extraordinary writ to correct the discovery order. We dismiss the appeal for lack of jurisdiction and decline to grant the requested writ.

"A discovery order is not usually 'final'—and hence not immediately appealable—as the litigation in conjunction with which the discovery is sought is still pending in the district court. 28 U.S.C. § 1291." *Sheehan* v. *Doyle*, 513 F.2d 895, 898 (1st Cr. 1975). Recognizing this principle, the Chamber argues we have jurisdiction by virtue of the collateral order doctrine enunciated in *Cohen* v. *Beneficial Industrial Loan Corp.*, 387 U.S. 541 (1941). *See also Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 169-72 (1974). Professor Moore has identified three characteristics an order must possess to satisfy the *Cohen* rule:

> "(1) the order must be a final determination of a claim of right 'separable from, and collateral to,' rights asserted in the action; (2) it must be 'too important to be denied review,' in the sense that it 'presents a serious and unsettled question'; and (3) its review cannot, in the nature of the question that it presents, await final judgment because 'when that time comes, it will be too late effectively to review the . . . order and rights conferred . . . will have been lost, probably irreparably.' " 9 J. Moore, Federal Practice ¶ 110.10, at 133 (2d ed. 1973), *quoting Cohen.*

These characteristics can be reduced to the three issues of separability, importance, and urgency.[2]

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[1] The protective order reads as follows:

"Defendant-Intervenor United Steelworkers of America, AFL-CIO-CLC will not make use of the list of member firms of the Chamber of Commerce of the United States of America and the Greater Providence Chamber of Commerce must provide in answer to interrogatories or disclose the identity of such member business firms except for the sole purpose of defending this lawsuit and for no other purpose."

[2] There is authority for recognizing a fourth requirement, namely, finality. *See, Rodgers* v. *United States Steel Corp.*, 508 F.2d

The Chamber argues that separability exists because the Chamber's members' first amendment right to associate freely is wholly distinct from the rights, issue, and injury which are at stake in the underlying action. *See International Business Machines Corp.* v. *United States,* 471 F.2d 507, 514 (2d Cir. 1972), *rev'd on other issues,* 480 F.2d 293 (2d Cir. 1973) (en banc), *cert. and leave to file petition for extraordinary writ denied,* 416 U.S. 979, 980 (1974). The Steelworkers counter that separability does not exist because, in the balancing process to determine the propriety of ordering discovery, refernce must be made to the issues of the underlying case to determine the relevance of the information whose disclosure has been ordered.[3] The order entered in this case is clearly not col-

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152, 159 (3d Cir. 1975), *petition for cert. filed,* 43 U.S.L.W. 3637 (U.S. May 27, 1975) (No. 74-1483). This requirement means that the district court's disposition of the matter for which collateral order treatment is sought must be final rather than provisional. This analysis does not add much to Professor Moore's statement of the prerequisites, however, because if the urgency requirement is satisfied the finality condition is necessarily met as well. It is tautological that if the district court's disposition of the issue is provisional rather than final, then appellate review of the specific issue is not yet necessary to prevent irreparable loss of the right asserted. Conversely, satisfaction of the finality rule would not necessarily entail satisfaction of the urgency requirement.

[3] The Chamber's rejoinder to this argument is that if it is accepted "no discovery order involving the First Amendment right of freedom of association would ever be immediately appealable, even where such information was in fact privileged, since in performing the balancing test required under *NAACP* [v. *Button,* 371 U.S. 415 (1963),] and *Bates* [v. *City of Little Rock,* 361 U.S. 516 (1960),] a court must always consider the relevance of the sought after information to the main case." We recognize the possibility that the information sought to be discovered might be so minimally relevant and its discovery so grossly intrusive into protected rights that the order could be realistically viewed as a collateral one. *See generally Eisen, supra* at 171. This is not such a case.

lateral in the same way as the order in *Cohen*, where the district court refused to apply the state statute requiring security for costs in certain derivative stockholder suits. That order did not relate in any way to the merits of the derivative action itself. *See Eisen* v. *Carlisle & Jacquelin, supra* at 172; *United States* v. *Schiavo*, 504 F.2d 1 (3d Cir. 1974) (en banc), *cert. denied*, 95 S. Ct. 690 (1975) (gag rule in criminal trial was a collateral order appealable under *Cohen*). In contrast, the discovery order here is materially connected with the underlying preemption issue. *See Silvr Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 496 F.2d 800, 805 (2d Cir. 1974) (en banc).

We are not required to rest our dismissal of this appeal on the collaterality issue alone. In *Cohen* the Court stressed the importance of the issue it was called upon to decide:

> "[W]e de not mean that every order fixing security is subject to appeal. Here it is the right to security that presents a serious and unsettled question. If the right were admitted or clear and the order involved only an exercise of discretion as to the amount of security . . . appealability would present a different question." 337 U.S. at 547.

The Second Circuit has repeatedly held that an important factor bearing on the application of *Cohen* is whether decision of the issue appealed will settle the matter not simply for the case in hand but for many others. *E.g., Ronson Corp.* v. *Liquifin Aktiengesellschaft*, 508 F.2d 399, 401-02 (2d Cir. 1974); *International Business Machines Corp.* v. *United States*, 480 F.2d 293, 298 (2d Cir. 1973) (en banc), *cert. and leave to file petition for extraordinary writ denied*, 416 U.S. 979, 980 (1974); *Weight Watchers of Philadelphia, Inc.* v. *Weight Watchers International, Inc.*, 455 F.2d 770, 773 (2d Cir. 1972); *Donlon Industries, Inc.* v. *Forte*, 402 F.2d 935, 937 (2d Cir. 1968); *American Express Warehousing, Ltd.* v. *Transamerica Ins. Co.*, 380 F.2d 277,

280 (2d Cir. 1967).[4] The rationale behind these cases is to avoid putting such a large crack in the final judgment dam that the ensuing flood of appeals will engulf the appellate courts. *See Borden Co.* v. *Sylk*, 410 F.2d 843, 845-46 (3d Cir. 1969). "Once the collateral order doctrine is applied to orders for disclosure by parties, it is difficult to suggest any limitation on the right to appeal such an order over a claim of privilege." 4 J. Moore, Federal Practice ¶ 26.83 [6], at 57 (Supp. 1973).

Appellant argues in its reply brief that this appeal presents an important and unsettled question: whether the first amendment privilege recognized in *NAACP* v. *Alabama, supra,* must be accorded to an association whose membership consists of corporations as distinguished from one whose members are natural persons. If we assume that this is indeed an unsettled question, that concession gives little succor to the Chamber's cause, for the district court did not bottom its discovery order on a rejection of the Chamber's position. The basis for the order was that the information sought was "highly relevant" and that the Chamber had waived its first amendment protection by posing harm to its members in issue in the suit. Whether these decisions were right or wrong, they do not present the important question the Chamber asserts.

The third *Cohen* condition, urgency, concerns whether denying review would leave the party seeking it "powerless to avert the mischief of the order." *Perlman* v. *United States,* 247 U.S. 7, 13 (1918). Here, the Chamber has not

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[4] In *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp., supra,* the Second Circuit stated that the importance condition of *Cohen* is met in appeals from orders refusing to disqualify an attorney. If "importance" has the meaning given it in the Second Circuit cases cited in the text, it is difficult to understand how every order refusing to disqualify is "important." But the *Silver Chrysler* result may reflect an overriding concern for judicial economy and for avoiding any interim appearance of impropriety. Such exceptional considerations are absent here.

shot the last arrow in its quiver, since it can refuse to comply and seek review from the sanction, if any, imposed for that refusal. *See Gialde* v. *Time, Inc.*, 480 F.2d 1295, 1300 (8th Cir. 1973); *Carr* v. *Monroe Mfg. Co.*, 431 F.2d 384, 387 (5th Cir. 1970), *cert; denied sub nom. Aldridge* v. *Carr*, 400 U.S. 100 (1971). The Supreme Court has recently styled it "a familiar procedure" to advise one's client "to resist and risk a contempt citation, thereby allowing precompliance appellate review." *Maness* v. *Meyers*, 95 S. Ct. 584, 593 (1975). And earlier cases echo the same theme. *See United States* v. *Ryan*, 402 U.S. 530 (1971); *Cobbledick* v. *United States*, 309 U.S. 323 (1940); *Alexander* v. *United States*, 201 U.S. 117 (1906). If we treat these cases as providing guidance regarding the content of the urgency standard, they suggest that the Chamber's claim that review must be afforded now lest meaningful review be forever lost must fail absent a contempt adjudication.

The Chamber could secure review of a criminal contempt finding. *See Union Tool Co.* v. *Wilson*, 259 U.S. 107, 111 (1922). If the district court certified it as final under Fed. ately from an order dismissing its complaint as the sanc- R. Civ. P. 54(b), the Chamber could also appeal immedition for noncompliance. *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 680-81 (1958). Admittedly there is less certainty as to whether an order adjudicating a party in civil contempt would be appealable, *see Fox* v. *Capitol Co.*, 299 U.S. 105 (1936); *Hodgson* v. *Mahoney*, 460 F.2d 326, 328 (1st Cir.), *cert. denied*, 409 U.S. 1039 (1972),[5] but even if this possibility satisfies the urgency requirement, that is insufficient in light of the failure to meet the other two prerequisites of the collateral order doctrine.

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[5] The *Alexander*, *Cobbledick*, and *Ryan* cases do not distinguish between civil and criminal contempt in asserting that appeal would lie from contempt. But those cases may be distinguishable if the appellants there are viewed as strangers to the main proceedings rather than parties to the litigation.

We can treat the petition for a writ of mandamus and/or prohibition briefly. The District of Columbia Circuit recently disposed of a similar petition with an opinion that also answers the claim presented in this case. *National Right to Work Legal Defense* v. *Richey*, 510 F.2d 1239 (D.C. Cir. 1975), *cert. denied*, 43 U.S.L.W. 3655 (U.S. June 16, 1975).[6] That comprehensive opinion reviews the bases for mandamus and we will not repeat its analysis here. Traditional mandamus is available to correct a clear usurpation of judicial power, but no such excess is present in this case. Nor is "supervisory" mandamus appropriate, for the district judge has not exhibited any persistent or deliberate disregard for limiting rules. *See Will* v. *United States*, 389 U.S. 90 (1967); *La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1957). "Advisory" mandamus is also not appropriate, because it is available only where the question presented "is likely to confront a number of lower court judges in a number of suits before appellate review is possible. . . ." *National Right to Work Legal Defense* v. *Richey*, *supra* at 1243. The most that can be said in favor of issuing an extraordinary writ here is the equitable consideration that the question may for practical reasons evade review otherwise. However, we have already indicated in our consideration of *Cohen* that the Chamber may challenge the order through disobedience. Thus we are not persuaded that our refusal to grant the writ will effectively eliminate meaningful appellate review because the harm feared, disclosure, will be irremediable. We add in this connection that even the sanction of civil contempt might be subject to review by mandamus, as opposed to appeal, in part because of its potentially nonreviewable status otherwise. *See generally* H. M. Hart & H. Wechsler, The Federal Courts and the Federal System 1570-71 (2d ed. P. Bator, P. Mishkin, D. Shapiro & H. Wechsler 1973).

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[6] The Supreme Court denied a stay of the district court's disclosure order in the *Richey* case. *See* 43 U.S.L.W. 3549-50 (Apr. 14, 1975).

But the present posture of the case does not make it a member of "the limited class of cases where denial of immediate review would render impossible any review whatsoever. . . ." *United States* v. *Ryan, supra* at 533. We therefore perceive no extraordinary circumstances requiring issuance of the writ.

Appeal dismissed and petition denied.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

GRINNELL CORPORATION, *Plaintiff*

v.

MARY C. HACKETT, Director of the Department of Employment Security of the State of Rhode Island, and JOHN J. AFFLECK, Director of the Department of Social and Rehabilitative Services of the State of Rhode Island, *Defendants,*

and

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA and the GREATER PROVIDENCE CHAMBER OF COMMERCE, *Plaintiff-Intervenors,*

and

THE UNITED STEELWORKERS OF AMERICA, *Defendant-Intervenor*

Order Compelling Plaintiffs To Answer Interrogatories

Pursuant to the Court's opinion of December 9, 1974, IT IS ORDERED that;

A. Plaintiff Grinnell Corporation shall answer under oath, no later than January 19, 1975, the interrogatories previously served by the defendant-intervenor.

B. Plaintiffs the Chamber of Commerce of the United States of America and the Greater Providence Chamber of Commerce shall answer interrogatory number 1 of the interrogatories previously served by defendant intervenor and shall further answer interrogatories numbered 2, 3, 4,

5 and 6, said answers and further answers to be under oath and to be filed no later than January 19, 1975.

C. Plaintiffs the Chamber of Commerce of the United States of America and the Greater Providence Chamber of Commerce need not answer interrogatory numbered 9 of the interrogatories previously served by defendant-intervenor unless and until its relevance is more clearly established.

D. Defendant-Intervenor United Steelworkers of America, AFL-CIO-CLC will not make use of the list of member firms which the Chamber of Commerce of the United States of America and the Greater Providence Chamber of Commerce must provide in answer to interrogatories or disclose the identity of such member business firms except for the sole purpose of defending this lawsuit and for no other purpose.

/s/ Raymond J. Pettine
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 75-1083

GRINNELL CORPORATION,
Plaintiff, Appellee,

v.

MARY C. HACKETT,
Defendant, Appellee,

THE CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA AND THE
GREATER PROVIDENCE CHAMBER OF COMMERCE,
Plaintiff-Intervenors, Appellants.

Judgment

Entered July 29, 1975

This cause came to be heard on appeal from the United States District Court for the District of Rhode Island, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The appeal is dismissed; and

The petition for writs of mandamus and/or prohibition are denied.

By the Court:
/s/ DANA H. GALLUP, *Clerk.*

Before COFFIN, *Chief Judge,*
MCENTEE and CAMPBELL, *Circuit Judges.*
(Caption omitted in printing)

Order of Court

Entered September 9, 1975

The petition for rehearing filed August 11, 1975, is hereby denied.

By the Court:
/s/ DANA H. GALLUP, *Clerk*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

GRINNELL CORPORATION, *Plaintiff*,

v.

MARY C. HACKETT, Director of the Department of Employment Security of the State of Rhode Island and JOHN J. AFFLECK, Director of the Department of Social and Rehabilitation Services of the State of Rhode Island, *Defendants*,

and

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA and GREATER PROVIDENCE CHAMBER OF COMMERCE, *Intervenors*.

Complaint for Declaratory Judgment and Injunction

The Chamber of Commerce of the United States of America and Greater Providence Chamber of Commerce (jointly referred to hereafter as "intervenors"), by their attorneys, Lawrence M. Cohen, Gerard C. Smetana, Guy J. Wells and Jeffrey S. Goldman, for their complaint against Mary C. Hackett, Director of the Department of Employment Security of the State of Rhode Island, and John J. Affleck, Director of the Department of Social and Rehabilitation Services of the State of Rhode Island, defendants, allege as follows:

COUNT I

1. This action arises under Article VI, Clause 2, of the Constitution of the United States, and under the Labor Management Relations Act, as amended, 29 U.S.C. 141 *et seq.* (hereafter "LMRA"), an Act of Congress regulating commerce.

2. This Court has original jurisdiction of this action under 28 U.S.C. 1337, 28 U.S.C. 1331 and the Federal Declaratory Judgment Act, as amended, 28 U.S.C. 2201-02.

3. The Chamber of Commerce of the United States of America is an association, with its principal office in Washington, D.C., consisting of a membership of over 3,700 state and local chambers of commerce and trade and professional associations, a direct business membership in excess of 38,000, and underlying membership of approximately 5,000,000 business firms and individuals of which a substantial number employ Rhode Island residents.

4. The Greater Providence Chamber of Commerce, an affiliate of The Chamber of Commerce of the United States of America, is the largest association of Rhode Island employers.

5. Intervenors intervene on behalf of their memberships which are composed substantially of employers engaged in interstate commerce within the meaning of the Labor Management Relations Act and subject to the jurisdiction of the National Labor Relations Board who employ Rhode Island residents with whom said employers are legally obligated to bargain collectively under Federal Labor Law, and all those similarly situated.

6. Defendant Mary C. Hackett (hereafter "Hackett") is the Director of the Department of Employment Security of the State of Rhode Island; and defendant John J. Affleck (hereafter "Affleck") is the Director of the Department of Social and Rehabilitation Services of the State of Rhode Island.

7. G.L.R.I. (1956) §§ 28-44-1 through 28-44-61, as amended, authorizes, *inter alia*, payment of benefits to otherwise eligible persons who are unemployed as a result of a labor dispute, including those directly participating in a dispute by means of a strike against their employer. Such benefits are paid on a weekly basis for 26 weeks with the possibility of further extension, commencing after a disqualification period.

8. Intervenors have information and believe that pursuant to G.L.R.I. (1956) §§ 28-42-18 and 28-42-19, defend-

ant Hackett currently is authorizing, and drawing, vouchers on the Unemployment Security Fund to effect payments to applicant striking employees; unless enjoined, she will continue to effect such payments and will authorize unemployment benefits and will effect payments thereof to other striking employees who apply.

9. Similarly, under G.L.R.I. §§ 40-9-1 through 40-9-31, striking employees receive public assistance.

10. Intervenors have information and believe defendant Affleck currently authorizes and effects payment of public assistance to striking employees; unless enjoined, he will continue to effect such payments, and will authorize and effect payments thereof to other striking employees who apply.

11. Intervenors have information and believe the foregoing payments of unemployment benefits constitute a substantial alternate source of income to striking employees. In some instances, said payments constitute 70 per cent of the striking employees' take home pay.

12. Payment by the defendants of public assistance and unemployment compensation benefits to individuals and the families of individuals who voluntarily leave their employment to directly engage in and participate in an economic strike against their employer, interferes with and infringes upon free collective bargaining as guaranteed to plaintiff by Congress under the Labor Management Relations Act of 1947, as amended, 29 U.S.C. 141 *et seq.;* constitutes an intrusion by the State of Rhode Island into the field of labor-management relations which Congress has preempted and occupied to the full extent of its powers; and, accordingly, violates Article VI, Clause 2 of the Constitution of the United States.

13. Said payments permit a union to strike voluntarily to obtain its economic demands from the class of aggrieved employers, while confronting said class with all

of the financial burdens imposed by a strike, without any correlative economic disadvantage to its membership. Intervenors' aggrieved members are therefore uniformly forced either to agree to higher labor costs, or face additional losses of prifits caused by prolonged strikes. Although quantifying the damage so incurred is difficult, the violation of the right to free collective bargaining creates in excess of $10,000.00 in damages, excluding interest and costs, to a substantial number of intervenors' members, individually.

14. The memberships here represented by intervenors are suffering and will continue to suffer irreparable injury in that regardless of the eventual outcome of the instant action, the collective bargaining process will have been unalterably affected unless an injunction issues.

15. None of the striking employees entitled to or presently receiving unemployment bnefits or public assistance, or both, and no persons so situated who hereafter may apply for or receive either or both of them, have been made parties to this action although they may have or claim an interest in it and may be affected by the outcome for the reason that they are too numerous to be joined and timely served.

16. Intervenors have no adequate remedy at law.

Count II

1-16. Intervenors for a second count reallege and reiterate each and every allegation hereinabove set forth in Count I and, in addition, allege:

17. The aforementioned payments to striking employees authorized and effected by defendants causes economic stagnation, contributes to inflation, depletes the benefit funds and makes business within the State less competitive.

WHEREFORE, intervenors pray that this Court:

(a) Adjudge, decree and declare that the aforesaid application of the laws of Rhode Island be illegal because it constitutes an interference with, and impingement upon, free collective bargaining as guaranteed to plaintiff by Congress under the Labor Management Relations Act of 1947, 29 U.S.C. 141 *et seq.;* because it constitutes an intrusion by the State of Rhode Island into the field of labor-management relations which Congress has preempted and occupied to the full extent of its powers; and because it, accordingly, violates Article VI, Clause 2 of the Constitution of the United States;

(b) Preliminarily and, thereafter, permanently enjoin and restrain defendant Hackett, or any person acting on her behalf or that of the State of Rhode Island under the provisions of Title 28, G.L.R.I. (1956), Chapter 42 through 44, as amended, from authorizing unemployment benefits and from drawing vouchers from the employment security fund of the State to pay such benefits to any employee participating in a labor dispute within the jurisdiction of the LMRA and the National Labor Relations Board who, prior to participating in said labor dispute, was not receiving such benefits;

(c) Preliminarily and, thereafter, permanently enjoin and restrain the defendant Affleck, or any person acting on his behalf or that of the State of Rhode Island under Title 28, G.L.R.I. (1956), Chapter 9, as amended, from authorizing and effecting payments of public assistance to any employee participating in a labor dispute within the jurisdiction of the LMRA and the National Labor Relations Board who, prior to participating in said labor dispute, was not receiving such benefits; and

(d) That such other and further relief be granted to intervenors as this Court shall deem appropriate.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Civil Action No. 4926

GRINNELL CORPORATION, *Plaintiff*,

v.

MARY C. HACKETT, Director of the Department of Employment Security of the State of Rhode Island and JOHN J. AFFLECK, Director of the Department of Social and Rehabilitation Services of the State of Rhode Island, *Defendants*,

and

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA and GREATER PROVIDENCE CHAMBER OF COMMERCE, *Intervenors*.

Interrogatories of Defendant-Intervenor United Steelworkers of America, AFL-CIO to Plaintiff-Intervenor the Chamber of Commerce of the United States of America

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, Defendant-Intervenor United Steelworkers of America, AFL-CIO, hereby requests that the following Interrogatories be answered by Plaintiff-Intervenor The Chamber of Commerce of the United States of America (hereinafter referred to as "th Chamber") or any of its agnts, competent to testify on its behalf with knowledge of the facts about which inquiry is made.

In responding to these Interrogatories the Chamber is not asked to disclose the mental impressions, conclusions, opinions or legal theories of its attorneys insofar as such is protected by Rule 26(b)(3) of the Federal Rules of Civil Procedure. However, the Chamber is asked to disclose the evidentiary material in its possession relating to each of the subjects described in said Interrogatories.

I. Definitions

As used herein:

A. "Description" or "describe," when referring to a document as hereinafter defined, shall mean that the Chamber shall set forth the author or originator, addressee(s), date, title or subject matter, and the present custodian of the original thereof or, if unknown, the present custodian of any copy thereof and the last known address of each such custodian.

B. "Document" shall mean any written, printed, typed or other graphic matter of any kind or nature, and all mechanical and electronic sound recordings or transcripts thereof, and other data compilations from which information can be obtained, translated, if necessary, by the Chamber through detection devices into reasonably usable form, in the possession and/or control of the Chamber, its employees or agents, or known by the Chamber to exist.

C. "Officers," "directors," "Agents" or "employees', shall mean any person now serving as such, if applicable, and any person serving at any relevant time in any such capacity even though no longer serving in such capacity.

D. "Date" shall mean the exact day, month and year if ascertainable or, if not, the best approximation (including relationship to other events).

II. Interrogatories

1. List the name, principal office address and Rhode Island address of each "underlying" member business firm of the Chamber or of its affiliate, the Greater Providence Chamber of Commerce (hereafter "Providence Chamber") who is now or who at any time relevant to this action has been an employer subject to the Rhode Island Employment Security Act, 28 R.I.G.L. § 28-42-1 *et seq.* (hereafter "RIESA").

2. Of the business firms named in response to Interrogatory No. 1, list each one whose employees were engaged in a strike in the State of Rhode Island at any time during the period May 30, 1969 to the present.

3. With respect to each employer and each strike referred to in the answer of Interrogatory No. 2, state the following:

(a) The date the strike commenced;

(b) The date the strike terminated;

(c) Method of termination, e.g., agreement between the parties, Union's loss of bargaining agent status;

(d) A detailed description of the employer's last economic offer prior to the strike, including a list of each wage or fringe benefit component of such offer and the cost, as computed by the employer, of each such wage or fringe benefit component;

(e) A detailed description of the terms of the economic settlement on which basis the strike was terminated, including a list of each wage or fringe benefit component of such settlement and the cost, as computed by the employer, of each such wage or fringe benefit component; and

(f) The name of the union which conducted the strike.

4. Of the employers referred to in the answer to Interrogatory No. 2, name each one whose account was charged for unemployment benefits paid to striking employees pursuant to RIESA, during a strike, and for each strike, state the following:

(a) The total amount charged to the employer's account for unemployment benefits;

(b) The total number of strikers who received unemployment benefits from the State of Rhode Island and

(c) The total number of strikers who did not receive unemployment benefits from the State of Rhode Island.

5. Were any of the strikes referred to in the answers to Interrogatories Nos. 2 and 3 simultaneously directed against plants or facilities of the same employer located outside of the State of Rhode Island? If so, for each such employer and each such strike state the following:

(a) The name and address of each plant or facility against which the strike was directed (include Rhode Island plants and facilities);

(b) The number of striking employees as of the commencement of the strike at each plant or facility named in (a);

(c) The total number of strikers at each plant or facility named in (a) who received state unemployment benefits during the strike; and

(d) The total number of strikers at each plant or facility named in (a) who did not receive state unemployment benefits.

6. Were any of the strikes referred to in the answers to Interrogatories Nos. 2 and 3 simultaneously directed against other employer participants in a formal or informal multi-employer bargaining arrangement? ("Formal multi-employer arrangement" refers to an employer association or other combination which engaged in collective bargaining on a single collective bargaining unit basis. "Informal multi-employer arrangement" refers to a group of employers, such as the Coordinating Committee Steel Companies, who technically comprise separate bargaining units but who, nevertheless, join together for purposes of conducting collective bargaining negotiations with

a common union or unions.) If so, for each such strike state the following:

(a) The name of each employer against which the strike was directed and for each employer:
  (i) The name and address of each plant or facility against which the strike was directed (include Rhode Island plants and facilities);
  (ii) The number of striking employees as of the commencement of the strike at each plant or facility named in (a)(i);
  (iii) The total number of strikers at each plant or facility named in (a)(i) who received state unemployment benefits during the strike; and
  (iv) The total number of strikers at each plant or facility named in (a)(i) who did not receive state unemployment benefits.

(b) The union or unions which conducted the strike;

(c) The date the strike commenced;

(d) The date the strike terminated;

(e) Method of termination, e.g., agreement between the parties, Union's loss of bargaining agent status;

(f) A detailed description of employer association or group's last economic offer prior to the strike, including a list of each such wage or fringe benefit component of such offer and the cost, as computed by the employer, of each such wage or fringe benefit component; and

(g) A detailed description of the terms of the economic settlement on which basis the strike was terminated, including a list of each wage or fringe benefit component of such settlement and

the cost, as computed by the employer, of each such wage or fringe benefit component.

7. List the title of each and every communication, booklet, book, pamphlet, periodical, circular, printed speech, memorandum, instructions, news release, or other document issued or distributed in the past ten years by the Chamber or its affiliates to constituent business firms or to the public, generally containing material referring to the receipt of unemployment compensation benefits by strikers.

8. List by title and recipient every communication, booklet, book, pamphlet, periodical, circular, printed speech, memorandum, or other document which contained material referring to the receipt of unemployment compensation benefits by strikers and which was sent in the past ten years by the Chamber, its agents or affiliates, to the following:

(a) The President of the United States or his assistants;

(b) Any individual who is now a Justice of the Supreme Court of the United States;

(c) Members of the House of Representatives or Senate of the United States or their legislative or administrative assistants; and

(d) Members of the Legislature of the State of Michigan.

9. List every communication received by the Chamber in the past ten years from any individual now serving as a Justice of the Supreme Court of the United States the subject matter of which related to the achievement of the Chamber's legislative, social policy or litigation objectives.

10. Describe in detail each and every procedure or program utilized by the Chamber in the past ten years to oppose or combat the payment of unemployment compensation to striking employees.

11. With respect to each procedure or program referred to in the answer to Interrogatory No. 10, state the following:

(a) The name, title and address of the individual(s) principally responsible for implementing said procedures or programs; and

(b) The amount of money expended by the Chamber on behalf of each such procedure or program.

12. In connection with the implementation of any procedure or program referred to in the answer to Interrogatory No. 10, state whether the Chamber has in the past ten years made any payment of money to the following and, if so, the total amount of such payments:

(a) Armand Thieblot;

(b) Ronald Sowin;

(c) Herbert Northrup;

(d) Edward J. Doherty; and

(e) North American Newspaper Alliance;

(f) George Denison.

13. Does the Chamber have in its possession any survey, statistical study, or any other document relating to the issue of whether or not the receipt or expectation of unemployment compensation benefits in Rhode Island causes workers in that state to stiffen bargaining demands beyond what such demands would have been absent such benefits? If so, describe each such survey, statistical study, or other document.

14. Identify every strike or settlement (if any) in the State of Rhode Island in which the Chamber alleges that the workers made higher bargaining demands than they would have absent the availability of unemployment compensation benefits, and for each such strike or settlement,

describe in detail every survey, statistical study or any other document which the Chamber has in its possession showing that such demands were in fact higher and for each such strike or settlement, state the following:

(a) The name and address of the employer;

(b) The name of the union;

(c) Whether plants or facilities of the same employer located outside the State of Rhode Island were struck as part of the same strike or settled as part of the same settlement and, if so, the name and address of every plant or facility involved in the strike or settlement;

(d) Whether employers other than that named in in (a) were struck as part of the same strike or settled as part of the same settlement and, if so, the name and address of every plant or facility involved in the strike or settlement;

(e) The number of strikers (by plant) at the commencement of the strike;

(f) The number of strikers (by plant) who received state unemployment benfits during the strike;

(g) The number of strikers (by plant) who did not receive state unemployment benefits during the strike;

(h) The bargaining demands of the union both at the commencement of negotiations and just prior settlement; and

(i) The bargaining demands which the Chamber contends would have been made by the union but for the avilability of unemployment benefits.

15. Does the Chamber have in its possession any survey, statistical study, or any other document relating to

the issue of whether or not the receipt or expectation of unemployment compensation benefits in Rhode Island causes workers in that state to strike when they would have settled absent such benefits. If so, describe in detail each such survey, statistical study, or other document.

16. Identify every strike (if any) in the State of Rhode Island which the Chamber alleges would have been settled absent the availability of unemployment compensation, and for each such strike, describe every survey, statistical study, or any other document which the Chamber has in its possession showing that such strike would, in fact, have been settled. In addition, for each such strike state the following:

(a) The name and address of the employer;

(b) The name of the striking union;

(c) Whether plants or facilities of the same employer located outside the State of Rhode Island were struck as part of the same strike and, if so, the name and address of each struck plant or facility;

(d) Whether employers other than that named in in (a) were struck as part of the same strike and, if so, the name and address of each struck plant or facility;

(e) The number of strikers (by plant) at the commencement of the strike;

(f) The number of strikers (by plant) who received state unemployment benefits during the strike; and

(g) The number of strikers (by plant) who did not receive state unemployment benefits during the strike.

17. Does the Chamber have in its possession any survey, statistical study, or any other document relating to

the issue of whether or not the receipt or expectation of unemployment compensation benefits in Rhode Island causes workers in that state to continue a strike for a longer time than they would have absent such benefits? If so, describe in detail each such survey, statistical study, or any other document.

18. Identify every strike (if any) in the State of Rhode Island which, it is alleged, was prolonged by the availability of unemployment compensation, and for each such strike describe in detail every survey, statistical study, or other document which the Chamber has in its possession showing that such strike was in fact prolonged. In addition, for each such strike state the following:

(a) The name and address of the employer;

(b) The name of the striking union;

(c) Whether plants or facilities of the same employer located outside the State of Rhode Island were struck as part of the same strike and, if so, the name and address of each struck plant or facility;

(d) Whether employers other than that named in in (a) were struck as part of the same strike and, if so, the name and address of each struck plant or facility;

(e) The number of strikers (by plant) at the commencement of the strike;

(f) The numb er of strikers (by plant) who received state unemployment benefits during the strike;

(g) The number of strikers (by plant) who did not receive state unemployment benefits during the strike;

(h) The date the strike commenced;

(i) The approximate date the strike would have ended but for the availability of unemployment benefits; and

(j) The date the strike actually ended.

19. Does the Chamber have in its possession any statistical comparisons or studies of the length and cost of strikes in Rhode Island (or Michigan and New York) and the length and cost of strikes of similar size in similar industries in states not granting unemployment benefits to strikers? If so, identify each such comparison or study by its title, author and date.

20. Does the Chamber have in its possession (in addition to the affidavits already filed with the Court) any transcripts of interviews or any other document regarding the effect on strikes or settlements of the actual or expected receipt of unemployment benefits in Rhode Island? If so, describe in detail each such transcript of interview or other document.

21. Does the Chamber have in its possession any empirical study or any other document regarding the nature and scope of the long-term impact on industry pricing and competitiveness of longer strikes and costlier outcomes allegedly caused by the availability of unemployment benefits? If so, state the following:

(a) Describe such empirical study or other documents, including the title of any supporting statistical or economic studies; and

(b) The name and position of any individual who will be offered as an expert witness on this subject.

22. Does the Chamber have in its possession any empirical study or any other document regarding the nature and scope of the short-term impact on consumer demand of longer strikes and costlier outcomes allegedly

caused by the availability of unemployment benefits? If so, state the following:

(a) Describe such empirical study or other document, including the title of any supporting statistical or economic studies; and

(b) The name and position of any individual who will be offered as an expert witness on this subject.

These Interrogatories are continuing in nature so as to require timely supplemental answers should the Chamber, its affiliates or agents, obtain additional information, regardless of the source, between the time answers are served and the date of trial.

Dated: July 17, 1974

WARREN H. PYLE
ANGOFF, GOLDMAN, MANNING, PYLE & WANGER
/s/ Warren H. Pyle
SANFORD H. GORODETSKY
/s/ Sanford H. Gorodetsky
Attorneys for Defendant-Intervenor
United Steelworkers of America, AFL-CIO

(Caption Omitted in Printing)

Memorandum Opinion

Defendant-intervernor the United Steelworkers of America ("Steelworkers") have propounded interrogatories to both the plaintiff, Grinnell Corporation, ("Grinnell") and the plaintiff-intervenor The Chamber of Commerce of the the United States of America ("Chamber"). The "Chamber" has made specific objections to interogatories One and Nine and has refused to answer interrogatories Two through Six on the grounds that the "Chamber" has no information relating to the questions asked. "Grinnell" has objected to all ten interrogatories addressed to it by "Steelworkers". It should be noted that the ten interrogatories 13 through 23 propounded to the "Chamber", which interrogatories have been answered by the "Chamber".

CHAMBER INTERROGATORIES

(1) Objection to #1 through 6

Interrogatory #1 requests a list of members of the "Chamber" who are subject to the Rhode Island Employment Security Act. The "Chamber" objects to this interrogatory on several grounds:

> 1) The membership list of the "Chamber" is constitutionally privileged from disclosure, as such disclosure would create a chilling effect on the exercise of members' First Amendment right to freedom of association. *NAACP* v. *Alabama*, 357 U.S. 449 (1958); *Bates* v. *City of Little Rock*, 361 U.S. 516 (1960). Furthermore, the "Chamber" asserts that the "Steelworkers" are unable to show a compelling need for such information such as would override the First Amendment deprivation.
>
> 2) Disclosure of the membership list would cause irreparable injury to the "Chamber" and its members, by virtue of possible violence, picketing, vandalism and harassment by pro-labor groups against "Chamber" members.

3) The membership list is a confidential trade secret and therefore protected under Fed.R.Civ.P. 26(c)(7). The "Chamber" alleges that under that Rule, the "Steelworkers" have failed to meet the burden of establishing the relevance of and necessity for the material sought in relation to its defense.

Because of the allegations in paragraphs 13 and 14 of the "Chamber's" complaint I find inquiry No. 1 relevant and should be answered. I concede the relevant inquiry may go beyond "Chamber" members, however, this does not negate counsel's argument on behalf of the "Steelworkers" that the "Chamber" is a voluntary party to this action and has itself alleged injury to its members. The door has been opened warranting answer to interrogatory #1, so that the "Steelworkers" may inquire specifically as to these alleged injuries.

Now assuming there is a privilege to protect identity they have interjected the issue and cannot now complain. I further cover this point infra. Objection to #1 is overruled—limited however to the period of May 29, 1969 to the present.

Interrogatories 2 through 6 are highly relevant to the issues before the Court, in that they inquire into the experience of member firms of the "Chamber" in Rhode Island in any strike situations which may have occurred. The "Chamber" has not answered these interrogatories, alleging that answering would constitute disclosure of members' identities in violation of the First Amendment; that such information concerning the experience of "Chamber" members is irrelevant in that the pertinent inquiry is the impact upon all employers in Rhode Island, not just "Chamber" members; that such information can be gleaned from public records and directly from any Rhode Island employer who has been involved in a strike; that the "Chamber" has no knowledge or documents relating to the subject of these interrogatories and to require them

to acquire and compile such information from members would be burdensome and oppressive.

While it is true that the Court of Appeals, in remanding this case, emphasized a "macrocosmic" approach to the issues of federal pre-emption rather than a "particularistic" inquiry, 459 F.2d at 458 n. 9, it is clear that to answer the questions raised by the Court of Appeals, a massive body of data must be compiled by the plaintiff and plaintiff-intervenors to meet the burden of proof on the allegations raised in their Complaints. The "Chamber" itself has alleged adverse economic impact on its Rhode Island members by virtue of the "R.I.E.S.A." and it must substantiate its allegations by inquiry into the effect of the "R.I.E.S.A.". While the pre-emption question will obviously be argued in terms of experiences beyond the boundaries of the State of Rhode Island, certainly the impact of Rhode Island "Chamber" members is highly relevant to the allegations raised by plaintiff-intervenor. *See* Complaint 5, 13, 14.

As Judge Feikens stated in *The Dow Chemical Company et al.* v. *Taylor,* C.A.No. 38644 (memorandum opinion, June 27, 1974) at 4:

> "It is elementary that a party must as a matter of course have the right to inquire into the factual bases of allegations contained in the opponent's pleadings. *See, e.g., Hughes* v. *Groves,* 47 F.E.D. 52, 57 (W.D.Mo. 1969); *Lance, Inc.* v. *Ginsburg,* 32 F.R.D. (E.D.Pa. 1962)."

Interrogatories 2 through 6 do no more than this. Even assuming that the "Chamber's" claim of constitutional privilege would otherwise be available to the "Chamber" and its members under the authority of *NAACP* v. *Alabama,*

> alleged in the pleading of the interrogated party, about which he presumably has information, or if the interrogated party would gather the information in the prepa-

> ration of his own case." 8 Wright & Miller *Federal Practice & Procedure,* § 2174 at 555 (1970).

See Kainz v. *Anheuser Busch, Inc.,* 15 F.R.D. 242 (D. Ill. 1953); *Adelman* v. *Mordberg Mfg. Co.,* 6 F.R.D. 383 (W. Wis. 1947); *RCA Mfg. Co.* v. *Decca Records, Inc.,* 1 F.R.D. 433, 435 (S.D.N.Y. 1940); *Hodge* v. *Osteopathic General Hospital of R.I.,* 249 A.2d 81 (R.I. 1969). The "Chamber's" objection to interrogatories 2 through 6 is hereby overruled.

(2) Objection to #9

This question seeks a listing of all communications received by the "Chamber" during the past ten years "from any individual now serving as a Justice of the Supreme Court of the United States the subject matter of which related to the achievement of the "Chamber's" legislative, social policy or litigation objectives." I am in substantial agreement with Judge Feiken's ruling in the *Dow* case that this interrogatory need not be answered unless and until its relevance is more clearly established. The "Chamber" is ordered to answer all interrogatories except #9 in accordance *supra,* and its progeny.

> ". . . it would be fundamentally unfair to permit a party to withhold information relevant to allegations which it has itself made and the issues thereby raised, [and in such circumstances] the party must choose between its allegations and its privilege. *See Awtry* v. *United States,* 27 F.R.D. 399, 402-03 (S.D.N.Y. 1961); *Independent Productions Corp.* v. *Loew's, Inc.,* 22 F.R.D. 266, 276-77 (S.D.N.Y. 1958)."
> *Dow Chemical, supra* at 4.

In light of the "Chamber's" fear that relevation of the identity of some of its members would bring about reprisals from various pro-labor groups, defendant-intervenor has agreed to be bound by a protective order relating to the confidentiality of the identity of "Chamber" members, and the following language will be incorporated into the order of this Court:

> "Defendant-Intervenor United Steelworkers of America, AFL-CIO will not make use of the list of member business firms which the Chamber of Commerce of the United States of America must provide in its answer to the Interrogatories or disclosure the identity of such member business firms except for the sole purpose of defending this law suit, and for no other purpose."

Such a protective order, together with the federal labor laws and other state and federal laws, provide ample protection to "Chamber" members from illegal picketing or other illegal economic pressures or conduct which the "Chamber" feels might follow from the revelation of the identity of certain of its members. I also find the aforementioned protective order to be sufficient under Rule 26(c)(7), Fed.R.Civ.P., to protect the confidentiality of the "Chamber's" membership list.

As to the "Chamber's" argument of excessive burden in producing the information called for by interrogatories 2 through 6 it should be noted that defendant-intervenor is not seeking statistical information to be compiled by plaintiff-intervenor which goes solely to establishing its own defense, nor is it clear that the information sought by defendant-intervenor is obtainable from other sources equally available to both sides. Defendant-intervenor is not asking plaintiff-intervenor to do its own research, *Krantz* v. *United Staes,* 56 F.R.D. 555 (D.Va. 1972), but is merely seeking the statistical basis of plaintiff-intervenor's allegations.

> "An interrogatory will not be held objectionable as calling for research if it relates to details with the pretrial order previously entered in this case.

Grinnell Interrogatories

Plaintiff "Grinnell" has objected to all ten interrogatories propounded to it by defendant-intervenor "Steel-

workers". It is important to note that the specific interrogatories were preceded by the following statement:

> "In responding to these Interrogatories Grinnell is not asked to disclose the mental impressions, conclusions, opinions or legal theories of its attorneys insofar as such is protected by Rule 26(b)(3) of the Federal Rules of Civil Procedure."

Also, under "Definitions", the interrogator has defined "description" or "describe" as used in the interrogatories, as follows:

> "A. 'Description' or 'describe', when referring to a document as hereinafter defined, shall mean that Grinnell shall set forth the author or originator, addressee(s), date, title or subject matter, and the present custodian of the original thereof or, if unknown, the present custodian of any copy thereof and the last known address of each such custodian."

The interrogatories can be summarized.

"Grinnell" interrogatories numbers 1, 3 and 5 ask for the identity of any "survey, statistical study, or other document" in "Grinnell's" possession "relating to" the effect of unemployment compensation payments to strikers on stiffening or bargaining demands, calling of strikes, and the continuation of strikes. Numbers 2, 4 and 6 ask for detailed identification of all R.I. cases in which "Grinnell" contends that higher bargaining demands were made or strikes were called or prolonged as a result of the availability of unemployment compensation to strikers, and any survey, statistical study, or other document which supports those allegations. Number 7 asks for identification of any "statistical comparisons or studies" of the length and cost of strikes as between those states which do and those which do not grant unemployment benefits to strikers. Number 8 asks for identification of any "transcripts of interviews or any other documents regarding the effect on strikes or settlements of the actual or expected receipt of

unemployment benefits in R.I." Numbers 9 and 10 ask for identification of any "empirical study or other document" concerning long term impact of benefit payments of industry pricing and competitiveness, and its short term impact on consumer demand. They also seek to determine who will be called as expert witnesses on these subjects.

"Grinnell contends that interrogatories 1 through 7, 9 and 10 are objectionable on the ground that the documents called for were prepared in anticipation of litigation and contain mental impressions, legal analysis and theories of counsel, thus call for answers contrary to the "work product" rule. Fed.R.Civ. P. 26(b)(3); *Hickman* v. *Taylor*, 329 U.S. 495 (1947). This objection is inappropriate in light of the definition of "describe" which precedes the interrogatories, and the other prefatory remarks stated in the interrogatories. The only information being sought regarding documents, surveys and studies is that necessary for production under Rule 34, and are not objectionable under the "work product" rule. There is no indication that the interrogatories in question require a revelation of the contents or substance of hese documents. *See* 4 J. Moore, *Federal Practice* Par.26.58 at 26-216, 217 (1974).

"Grinnell" objects to interrogatory #8 on the ground that it calls for detailed descriptions of transcripts of interviews with potential witnesses and contravenes the "work product" rule, and further that the material requested is in the public domain. Once again, the term "describe" is used in that interrogatory, as that term is narrowly defined in the preface to the interrogatories, and as such is not objectionable for the reasons previously stated.

Objection is made by "Grinnell" to interrogatories 2, 4 and 6, on the ground that complying with such requests would require extracting and compiling a great deal of information and that such compilation would be burdensome. Furthermore, it is claimed that the documents themselves from which these surveys would be compiled are dis-

coverable themselves by defendant-intervenor. As recited earlier, in conjunction with objections raised by the "Chamber", such objection is without merit since the discovery relates to issues raised by the plaintiff and presumably requests information which would be gathered by the plaintiff in the preparation of its own case.

Finally, plaintiff objects to #s 1, 3, 5, 2, 4, and 6 on the ground that to reveal this information would require plaintiff to make unwanted admissions and represents an attempt by defendant-intervenor to maneuver plaintiff into an unfavorable tactical advantage. In light of the previous discussion as to what is called for by these interrogatories, I cannot accept plaintiff's argument in this regard.

The objections of plaintiff "Grinnell" to the interrogatories propounded are overruled, and plaintiff "Grinnell" is ordered to answer the interrogatories in accordance with the pre-trial order prepiously entered in this case.

An order will be prepared by counsel for the defendant-interpenor in accordance with this opinion.

/s/ Raymond J. Pettine
Chief Judge
(Delivered orally from the bench
December 9, 1974)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 4926

GRINNELL CORPORATION, *Plaintiff*,

v.

MARY C. HACKETT, Director of the Department of Employment Security of the State of Rhode Island and JOHN J. AFFLECK, Director of the Department of Social and Rehabilitation Services of the State of Rhode Island, *Defendant*,

and

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA and GREATER PROVIDENCE CHAMBER OF COMMERCE

Motion to Amend Order to Include Statement Under 28 U.S.C. § 1292(b)

[First Page Only]

Plaintiff Chamber of Commerce of the United States of America ("Chamber") hereby moves the Court to amend its Order of January 13, 1975 in the captioned action to include the statement prescribed by 28 U.S.C. § 1292(b) so that the Chamber may take an immediate appeal to the United States Court of Appeals for the First Circuit. In support hereof, the following is shown:

I. STATEMENT OF FACTS

1. The Chamber is a plaintiff in the captioned action, which involves the question of whether the Rhode Island Employment Security Commission may lawfully provide unemployment compensation benefits to striking employees.

2. On July 17, 1974, the Intervenors in this suit, the United Steelworks of America, AFL-CIO-CLC ("Steel-

workers''), served upon the Chamber a set of interrogatories directing the Chamber to identify those of its members who are subject to the Rhode Island Employment Security Act (''RIESA'') (Interrogatory 1) and further directing the Chamber to (1) identify, and provide information concerning, those of its members whose employees were engaged in a strike during the period of January 1, 1968 to April 1, 1973 (Interrogatories 2, 3, 4, 5 and 6); (2) provide information concerning strikes and strike settlements within the State of Rhode Island.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 4926

GRINNELL CORPORATION, *Plaintiff*

v.

MARY C. HACKETT, Director of the Department of Employment Security of the State of Rhode Island and JOHN J. AFFLECK, Director of the Department of Social and Rehabilitation Services of the State of Rhode Island, *Defendents*

and

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA and GREATER PROVIDENCE CHAMBER OF COMMERCE, *Plaintiff Intervenors*

and

THE UNITED STEELWORKERS OF AMERICA, *Defendant-Intervenors*

Notice of Appeal

(Filed January 31, 1975)

Notice is hereby given that Plaintiff-Intervenors, the Chamber of Commerce of the United States of America and the Greater Providence Chamber of Commerce hereby appeals to the Court of Appeals for the First Circuit from the orders:

1. Denying plaintiff-intervenors' motion for leave to reargue.

2. Denying plaintiff-intervenors' motion for a stay, and

3. Denying plaintiff-intervenors' motion to amend order to include statement under 28 U.S.C. § 1292(b) entered on January 28, 1975.

By their attorney,

/s/ Guy J. Wells

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-484

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, Petitioner,

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO•CLC, Respondent,

and

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-484

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, Petitioner,

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO•CLC, Respondent,

and

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

The respondent The United Steelworkers of America, AFL-CIO•CLC, (hereinafter "Steelworkers Union") respectfully asks that the Petition For A Writ Of Certiorari to the Court of Appeals which is pending in the above captioned case be denied forthwith because the order which underlies this proceeding is a pre-trial order compelling discovery. The identical issue is presented in Petition No. 75-485 which seeks a writ of certiorari to a similar decision by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 519 F.2d 595. There is no official report of the District Court's opinion, and significant parts of the first part of that opinion have been omitted in the reprint which appears in the Appendix to the Petition. A correct reprint of the first portion of the District Court's opinion is contained in the Appendix to this Brief (Opp. App. 1a-8a).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the "collateral order" exception to the final judgment rule should be extended to create an immediate appeal of right for parties who are ordered to answer interrogatories during the pre-trial stages of their own lawsuit which is pending in a federal district court?

STATUTES AND RULES INVOLVED

The pertinent provisions of the Constitution of the United States, of the Judicial Code, and of the Federal Rules of Civil Procedure are set forth at pp. 2-4 of the companion Petition, No. 75-485. However, the most pertinent provision of all was omitted, Rule 26(b)(1) of the Federal Rules of Civil Procedure which provides as follows:

> "(b) **Scope of Discovery.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).

STATEMENT

On May 15, 1972, the litigation which underlies this Petition was commenced by Grinnell Corporation (hereinafter "Grinnell") against the officials of the State of Rhode Island who administer that State's welfare and unemployment compensation programs, John J. Affleck[1] and Mary C. Hackett (hereinafter "State"). The Chamber of Commerce of the United States of America (hereinafter "Chamber") filed its Complaint in intervention against the State on May 30, 1972 (Pet. App. 13a-18a). The gravamen of those complaints is that the payment by the State of unemployment compensation to striking employees after seven weeks of unemployment as required by the Rhode Island Employment Security Act, R.I.G.L. § 28-42-1 *et seq.* (hereinafter "RIESA")[2] violates the Supremacy Clause of the United States Constitution because that State policy "interferes with and infringes upon free collective bargaining as guaranteed to plaintiff by Congress under the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 141 *et seq.* . . ." (Pet. App. 15a). The Steelworkers Union intervened to protect the interests of its members who were in the midst of conducting a lawful strike against Grinnell.

On June 15, 1972, the District Court dismissed both complaints essentially holding that the issue of

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1. John J. Affleck is not involved in administering the Rhode Island unemployment compensation program and is no longer a part of this litigation.

2. There is a general statutory requirement of one week of unemployment before benefits may be paid, R.I.G.L. § 28-44-14, and an additional six weeks of unemployment required of individuals who are "unemployed because of a strike. . . ." R.I.G.L. § 28-44-16.

the validity of the State's payment of welfare benefits and unemployment compensation to strikers was nonjusticiable. Appeals were taken only from the dismissal of the unemployment compensation-Supremacy Clause issue, and on March 15, 1973, the Court of Appeals reversed the dismissal and remanded the case to the District Court for further proceedings. *Grinnell Corporation v. Hackett,* 475 F.2d 449 (1973), *cert denied,* 414 U. S. 858 (1973). In the comprehensive Opinion filed at that time, the Court of Appeals specifically directed that an "adequate evidentiary record" be developed in order to provide "an appropriate and detailed evidentiary basis for deciding the preemption issue, and in particular the issue of infringement of federal policy." 475 F.2d at 461.

The Court of Appeals held that the "macrocosmic test," which had been announced in *I.T.T. v. Minter,* 435 F.2d 989 (1st Cir. 1970), *cert denied,* 402 U.S. 933 (1971) as governing Supremacy Clause challenges to the payment by states of welfare benefits to striking workers, also governed the unemployment compensation-Supremacy Clause issue. Under that test, the Chamber and Grinnell must establish by the preponderance of evidence that the State's policy of paying unemployment benefits to strikers results in: (1) workers stiffening bargaining demands beyond that which they would have demanded absent the availability of such benefits; (2) workers striking when absent such availability they would have settled without a strike; and, (3) strikes continuing for longer periods of time and resulting in higher settlements than would have resulted without such availability. Not only must they produce factual evidence tending to establish these factors, but they must

also establish a "causal relationship" between the factual evidence offered and the ultimate issue of impact on the federal right to free collective bargaining. 475 F.2d at 458-459.

Even before the remand the Chamber voluntarily adopted the "macrocosmic test" as the standard governing this case when it alleged in its Complaint that because of the State's policy of paying unemployment compensation to striking employees, "Intervenors' aggrieved members are therefore uniformly forced either to agree to higher labor costs, or face additional losses of profits caused by prolonged strikes." (Pet. App. 16a). Subsequent to the remand, all parties, including the Chamber, have engaged in extensive pre-trial discovery.

However, the progress towards trial came to a standstill when the Chamber began its efforts in January of this year to obtain pre-sanction appellate review of the District Court's order compelling it to answer the following interrogatory:

> "1. List the name, principal office address and Rhode Island address of each 'underlying' member business firm of the Chamber or of its affiiliate, the Greater Providence Chamber of Commerce (hereafter 'Providence Chamber') who is now or who at any time relevant to this action has been an employer subject to the Rhode Island Employment Security Act, 28 R.I.G.L. § 28-42-1 *et seq.* (hereafter 'RIESA')." (Pet. App. 20a).

The challenged interrogatory was one of a set of twenty-two interrogatories which the Steelworkers Union served upon the Chamber on July 17, 1974 (Pet. App. 30a). Interrogatories 13 through 22 of that

set require the Chamber to document in detail its position with regard to each element of the macrocosmic test (Pet. App. 25a-30a). In its Complaint, the Chamber had also alleged that "[t]he memberships here represented by intervenors are suffering and will continue to suffer irreparable injury . . ." as a result of the challenged State policy (Pet. App. 16a), and Interrogatories 2 through 6 require the Chamber to document in detail that injury (Pet. App. 21a-22a). The Steelworkers Union had served an almost identical set of interrogatories upon the Chamber in *Dow v. Taylor,* Civil No. 38644 (E.D. Mich.). Paralleling its action in *Dow,* the Chamber's response to all of these interrogatories was evasive and incomplete.[3] Therefore, obtaining the membership list requested in Interrogatory No. 1 became essential[4] because only by approaching the Chamber's members directly would the Steelworkers Union be able to obtain information about the injury, alleged in the Complaint, that these employers had suffered in strike *and non-*

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3. With regard to the injury allegedly suffered by its member-employers, the Chamber responded that it has "no studies or information concerning its members in this respect." (Opp. App. 8a). With regard to the complete and detailed identification requested of those strikes upon which the Chamber would rely to prove the elements of the "macrocosmic test," the Chamber simply made a general reference to any strikes mentioned in the prior depositions and affidavits which were already on file in the litigation (Opp. App. 8a-10a). There are enumerable strikes mentioned in those materials, and the Steelworkers Union still does not know upon which of those strikes the Chamber will rely at trial.

4. Had the Chamber answered all the interrogatories, except for Interrogatory No. 1, in full and complete detail, the Steelworkers Union would not have been able to press its request for the membership list.

strike[5] situations as a result of the challenged State policy.

District Court's Opinion

In a written Memorandum, filed on December 30, 1974, the District Court concluded that the information sought by Interrogatory No. 1 was both relevant and non-privileged and was therefore discoverable under the provisions of Rule 26(b) (1) of the Federal Rules of Civil Procedure (Opp. App. 2a-3a).

As to the relevancy of the membership list itself, the District Court stated that because of the allegations made by the Chamber in its Complaint of specific injury to its members, "I find inquiry No. 1 relevant and should be answered." (Opp. App. 2a). With regard to the overall relevancy consideration, the Memorandum notes:

> "While it is true that the Court of Appeals, in remanding this case, emphasized a 'macrocosmic' approach to the issues of federal pre-emption rather than a 'particularistic' inquiry, 457 F.2d at 458 n.9, it is clear that to answer the questions raised by the Court of Appeals, a massive body of data must be compiled by the plaintiff and plaintiff-intervenors to meet the burden of proof on the allegations raised in their Complaints. The 'Chamber' itself has al-

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5. It is important to note that under the *Grinnell* "macrocosmic test," the experience of the Chamber's members as Rhode Island employers in non-strike situations is also highly relevant. 475 F.2d at 458. The Chamber itself emphasized the importance of non-strike situations when it alleged in its Complaint that as a result of the State's policy "Intervenors' aggrieved members are therefore uniformly forced either to agree to higher labor costs, or face additional losses of profits caused by prolonged strikes" (Pet. App. 16a).

> leged adverse economic impact on its Rhode Island members by virtue of the 'R.I.E.S.A.' and it must substantiate its allegations by inquiry into the effect on the 'R.I.E.S.A.' While the pre-emption question will obviously be argued in terms of experiences beyond the boundaries of the State of Rhode Island, *certainly the impact on Rhode Island 'Chamber' members is highly relevant to the* allegations raised by plaintiff-intervenor. *See Complaint* 5, 13, 14." (Opp. App. 3a-4a) (emphasis added).

As it had in *Dow,* the Chamber claimed here that disclosure of the membership list would violate its members' First Amendment associational rights as recognized in *N.A.A.C.P. v. Alabama,* 357 U.S. 449 (1958). With regard to an element which is a necessary prerequisite to that claim of constitutional privilege, the District Court found that the entry of a strong protective order[6] prohibiting public disclosure of the identities of the members, when combined with other state and federal laws, would provide "ample protection to 'Chamber' members from illegal picketting [sic] or other illegal economic pressure or conduct which the 'Chamber' feels might follow from the revelation of the identity of certain of its members." (Opp. App. 5a).

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6. The protective order entered on January 15, 1975 reads as follows:

> "Defendant-Intervenor United Steelworkers of America, AFL-CIO-CLC will not make use of the list of member firms which the Chamber of Commerce of the United States of America and the Greater Providence Chamber of Commerce must provide in answer to interrogatories or disclose the identity of such member business firms except for the sole purpose of defending this lawsuit and for no other purpose." (Pet. App. 11a).

The District Court also held that any such privilege must be deemed to have been waived by the Chamber, as a party plaintiff, insofar as disclosure of information relevant to the allegations in its own Complaint is concerned (Opp. App. 4a-5a).

The District Court entered its order on January 15, 1975, compelling the Chamber to answer Interrogatory No. 1 (Pet. App. 10a). Thereafter, the District Court denied the Chamber's motion for reconsideration and also denied its motion for certification of the discovery issue as appealable under 28 U.S.C. § 1292(b). The Chamber filed a timely notice of appeal on January 31, 1975 (Pet. App. 41a).

Court of Appeals Opinion

The Chamber applied to the Court of Appeals for a temporary stay of the District Court's order which was granted. However on March 7, 1975, the Court of Appeals dissolved that stay (Opp. App. 12a). The hearing of the appeal was accelerated.

The Court of Appeals issued its decision on July 29, 1975, dismissing the appeal for want of appellate jurisdiction and denying the writ of mandamus for want of extraordinary circumstances. *Grinnell Corporation v. Hackett,* 519 F.2d 595 (1st Cir. 1975).

The Court of Appeals carefully analyzed and rejected the Chamber's primary contention that it had a right to an immediate appeal under the "collateral order" doctrine enunciated by this Court in *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949). To be appealable under *Cohen,* an order must possess all three of the following characteristics: separability from the issues in the underlying litigation; importance in

the sense that it must present a serious and unsettled question; and urgency such that immediate review must be granted or the rights involved will be lost, probably irreparably (Pet. App. 3a). With regard to separability, the Court of Appeals concluded that "the discovery order here is materially connected with the underlying preemption issue" (Pet. App. 5a). As to importance, the Court of Appeals rejected the Chamber's assertion that the appeal presented questions concerning the scope of First Amendment protections afforded to corporations because the District Court did not base its discovery order on a rejection of the Chamber's theory but rather upon the fact "that the information sought was 'highly relevant'. . . ." (Pet. App. 6a). Finally, the Court of Appeals concluded that there was no urgency in this case because there is a procedure whereby the Chamber could obtain appellate review without disclosing the list by simply refusing to comply with the District Court's order and by taking an appeal after sanctions of contempt or dismissal had been imposed upon it for that non-compliance (Pet. App. 7a). Thus the order compelling the Chamber to answer Interrogatory No. 1 was found to be wanting with regard to each of the three characteristics which an order must possess if it is to be appealable under the *Cohen* exception.

The Court of Appeals was equally as exhaustive in its consideration of the Chamber's request that a writ of mandamus be issued. The Court of Appeals concluded that traditional mandamus did not lie because there was no "clear usurpation of judicial power" here; that "supervisory" mandamus was not appropriate because the District Court had not exhibited "any persistent or deliberate disregard for limiting rules"; and that "advisory" mandamus was not available because the issue

was not one that would arise frequently before the issue could reach the appellate courts (Pet. App. 8a). Overall, the Court of Appeals declined to issue the writ of mandamus because it concluded that irremediable harm would not result to the Chamber or its members from the denial of immediate appellate review, especially in view of the availability of the alternative of review through contempt (Pet. App. 8a).

The Chamber filed a petition for rehearing which was denied by the Court of Appeals on September 9, 1975 (Opp. App. 13a).

ARGUMENT

The Chamber has taken the position that the issues presented by its Petition in this case are identical to those presented in its Petition, No. 75-485, for a writ of certiorari to the similar decision of the Sixth Circuit in the *Dow* litigation. Accordingly, the Argument which the Steelworkers Union has presented in its Brief in opposition to Petition, No. 75-485 is equally applicable here, and there is no need to restate that Argument in this Brief.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Brief For Respondent in Opposition filed in Petition No. 75-485, it is respectfully submitted that this Petition for a writ of certiorari should be denied.

Respectfully submitted,

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RESPONDENT'S APPENDIX

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

GRINNELL CORPORATION v. MARY C. HACKETT and THE CHAMBER OF COMMERCE of the UNITED STATES OF AMERICA, et al., plaintiff-intervenors and THE UNITED STEELWORKERS OF AMERICA defendant-intervenor	C. A. No. 4926

Memorandum

Defendant-intervenor the United Steelworkers of America ("Steelworkers") have propounded interrogatories to both the plaintiff, Grinnell Corporation, ("Grinnell") and plaintiff-intervenor The Chamber of Commerce of the United States of America ("Chamber"). The "Chamber" has made specific objections to interrogatories One and Nine and has refused to answer interrogatories Two through Six on the grounds that the "Chamber" has no information relating to the questions asked. "Grinnell" has objected to all ten interrogatories addressed to it by "Steelworkers". It should be noted that the ten interrogatories propounded to "Grinnell" are identical to interrogatories 13 through 23 propounded to the "Chamber", which interrogatories have been answered by the "Chamber".

Respondent's Appendix.

CHAMBER INTERROGATORIES

(1) Objection to #1 through 6

Interrogatory #1 requests a list of members of the "Chamber" who are subject to the Rhode Island Employment Security Act. The "Chamber" objects to this interrogatory on several grounds:

1) The membership list of the "Chamber" is constitutionally privileged from disclosure, as such disclosure would create a chilling effect on the exercise of members' First Amendment right to freedom of association. *NAACP v. Alabama,* 357 U.S. 449 (1958); *Bates v. City of Little Rock,* 361 U.S. 516 (1960). Furthermore, the "Chamber" asserts that the "Steelworkers" are unable to show a compelling need for such information such as would override the First Amendment deprivation.

2) Disclosure of the membership list would cause irreparable injury to the "Chamber" and its members, by virtue of possible violence, picketting, vandalism and harassment by pro-labor groups against "Chamber" members.

3) The membership list is a confidential trade secret and therefore protected under Fed.R.Civ.P. 26(c)(7). The "Chamber" alleges that under that Rule, the "Steelworkers" have failed to meet the burden of establishing the relevance of and necessity for the material sought in relation to its defense.

Because of the allegations in paragraphs 13 and 14 of the "Chamber's" complaint I find inquiry No. 1 relevant and should be answered. I concede the relevant inquiry may go beyond "Chamber" members, however, this does not negate counsel's argument on behalf of the

"Steelworkers" that the "Chamber" is a voluntary party to this action and has itself alleged injury to its members. The door has been opened warranting answer to interrogatory #1, so that the "Steelworkers" may inquire specifically as to these alleged injuries.

Now assuming there is a privilege to protect identity they have interjected the issue and cannot now complain. I further cover this point infra. Objection to #1 is overruled—limited however to the period of May 29, 1969 to the present.

Interrogatories 2 through 6 are highly relevant to the issues before the Court, in that they inquire into the experience of member firms of the "Chamber" in Rhode Island in any strike situations which may have occurred. The "Chamber" has not answered these interrogatories, alleging that answering would constitute disclosure of members' identities in violation of the First Amendment; that such information concerning the experience of "Chamber" members is irrelevant in that the pertinent inquiry is the impact upon all employers in Rhode Island, not just "Chamber" members; that such information can be gleaned from public records and directly from any Rhode Island employer who has been involved in a strike; that the "Chamber" has no knowledge or documents relating to the subject of these interrogatories and to require them to acquire and compile such information from members would be burdensome and oppressive.

While it is true that the Court of Appeals, in remanding this case, emphasized a "macrocosmic" approach to the issues of federal pre-emption rather than a "particularistic" inquiry, 457 F.2d at 458 n.9, it is clear that to answer the questions raised by the Court of Appeals, a massive body of data must be compiled by

the plaintiff and plaintiff-intervenors to meet the burden of proof on the allegations raised in their Complaints. The "Chamber" itself has alleged adverse economic impact on its Rhode Island members by virtue of the "R.I.E.S.A." and it must substantiate its allegations by inquiry into the effect of the "R.I.E.S.A.". While the pre-emption question will obviously be argued in terms of experiences beyond the boundaries of the State of Rhode Island, certainly the impact on Rhode Island "Chamber" members is highly relevant to the allegations raised by plaintiff-intervenor. *See* Complaint 5, 13, 14.

As Judge Feikens stated in *The Dow Chemical Company et al. v. Taylor,* C.A. No. 38644 (memorandum opinion, June 27, 1974) at 4:

> "It is elementary that a party must as a matter of course have the right to inquire into the factual bases of allegations contained in the opponent's pleadings. *See, e.g. Hughes v. Groves,* 47 F.R.D. 52, 57 (W.D. Mo. 1969); *Lance, Inc. v. Ginsburg,* 32 F.R.D. 51, 52 (E.D.Pa. 1962)."

Interrogatories 2 through 6 do no more than this. Even assuming that the "Chamber's" claim of constitutional privilege would otherwise be available to the "Chamber" and its members under the authority of *NAACP v. Alabama, supra,* and its progeny,

> ". . . it would be fundamentally unfair to permit a party to withhold information relevant to allegations which it has itself made and the issues thereby raised. [and in such circumstances] the party must choose between its allegations and its privilege. *See Awtry v. United States,* 27 F.R.D. 399, 402-03 (S.D.N.Y. 1961); *Independent Productions Corp. v.*

Loew's, Inc., 22 F.R.D. 266, 276-77 (S.D.N.Y. 1958)." *Dow Chemical, supra* at 4.

In light of the "Chamber's" fear that revelation of the identity of some of its members would bring about reprisals from various pro-labor groups, defendant-intervenor has agreed to be bound by a protective order relating to the confidentiality of the identity of "Chamber" members, and the following language will be incorporated into the order of this Court:

> "Defendant-Intervenor United Steelworkers of America, AFL-CIO-CLC will not make use of the list of member business firms which the Chamber of Commerce of the United States of America must provide in its answer to the Interrogatories or disclose the identity of such member business firms except for the sole purpose of defending this law suit, and for no other purpose."

Such a protective order, together with the federal labor laws and other state and federal laws, provide ample protection to "Chamber" members from illegal picketting or other illegal economic pressures or conduct which the "Chamber" feels might follow from the revelation of the identity of certain of its members. I also find the aforementioned protective order to be sufficient under Rule 26(c)(7), Fed.R.Civ.P., to protect the confidentiality of the "Chamber's" membership list.

As to the "Chamber's" argument of excessive burden in producing the information called for by interrogatories 2 through 6 it should be noted that defendant-intervenor is not seeking statistical information to be compiled by plaintiff-intervenor which goes solely to establishing its own defense, nor is it clear that the information sought by defendant-intervenor is obtain-

able from other sources equally available to both sides. Defendant-intervenor is not asking plaintiff-intervenor to do its own research, *Krantz v. United States,* 56 F.R.D. 555 (D.Va. 1972), but is merely seeking the statistical basis of plaintiff-intervenor's allegations.

> "An interrogatory will not be held objectionable as calling for research if it relates to details alleged in the pleading of the interrogated party, about which he presumably has information, or if the interrogated party would gather the information in the preparation of his own case." 8 Wright & Miller *Federal Practice & Procedure,* § 2174 at 555 (1970).

See Kainz v. Anheuser Busch, Inc., 15 F.R.D. 242 (D. Ill. 1953); *Adelman v. Nordberg Mfg. Co.,* 6 F.R.D. 383 (W. Wis. 1947); *RCA Mfg. Co. v. Decca Records, Inc.,* 1 F.R.D. 433, 435 (S.D.N.Y. 1940); *Hodge v. Osteopathic General Hospital of R.I.,* 249 A.2d 81 (R.I. 1969). The "Chamber's" objection to interrogatories 2 through 6 is hereby overruled.

(REMAINDER OF MEMORANDUM OMITTED IN PRINTING)

Respondent's Appendix.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

GRINNELL CORPORATION,
v.
MARY C. HACKETT, Director of the Department of Employment Security of the State of Rhode Island and JOHN J. AFFLECK, Director of the Department of Social and Rehabilitation Services of the State of Rhode Island,
and
THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA and THE GREATER PROVIDENCE CHAMBER OF COMMERCE.

C. A. No. 4926

Answers To Interrogatories

Plaintiff Chamber of Commerce of the United States of America ("Chamber"), by its attorneys, hereby answers the interrogatories propounded to the Chamber by the United Steelworkers of America on July 17, 1974 as follows:

Interrogatory No. 1:

In response to Interrogatory No. 1, the Chamber has noted its objection and has filed a memorandum in support of that objection.

Interrogatory No. 2:

In response to Interrogatory No. 2, the Chamber has no information except as has been set forth in the depositions previously taken in this cause and at which Intervenor United Steelworkers of America was present. There is no formal report regarding the receipt of un-

employment compensation benefits to strikers made by or to the Chamber and the Chamber has no studies or information concerning its members in this respect. On information and belief, any compiled information, records or data concerning this subject is maintained by the State of Rhode Island.

Interrogatories 3, 14, 16, and 18:

In response to Interrogatories Nos. 3, 14, 16 and 18, the Chamber has no information except that which was given in previous depositions in this cause wherein Intervenor United Steelworkers of America was present and that contained in the affidavit of Herbert Northrup and study of Armand Thiebolt which are currently on file with the Court and have been served upon the other parties of this action.

Interrogatories Nos. 5 and 6:

In response to Interrogatories Nos. 5 and 6, the Chamber has no knowledge of any of the information requested therein.

Interrogatory No. 7:

Statement on H.R. 12625, Employment Security Amendments of 1969 before the House Ways and Means Committee for the Chamber of Commerce of the United States by Russell L. Hibbard, October 7, 1969.

"Welfare and Strikers: Heads They Win Tails You Lose", April 1973.

Congressional Action, Volume 17, Number 19, May 10, 1973.

Business News Features, #416, June 1973, entitled "Taxpayers *Do* Support Strikers".

Statement of the Chamber of Commerce of the United States of America to the House Committee on

Ways and Means on the Job Security Assistance Act, by Sam Dyer and Russell Hubbard, April 23, 1974.

Explanation and Justification of Job Security Assistance Act of 1974.

Washington Report, "Chamber Goal: Fair Play In Labor Laws."

"State Versus Federal Control of Unemployment Compensation."

The Chamber has no knowledge as to what communications, pamphlets, etc. may have been issued or distributed by member State and local chambers of commerce during the past ten years.

Interrogatory No. 8:

None.

Interrogatory No. 9:

In response to Interrogatory No. 9, the Chamber has noted its objection and has filed a memorandum in support of that objection.

Interrogatory No. 10:

The only procedure or program utilized by the Chamber in the last ten years for the purpose specified in Interrogatory No. 10 has been a general educational program consisting of the preparation and distribution of the documents listed in response to Interrogatory No. 7.

Interrogatory No. 11(a):

Richard Berman, Labor Relations Counsel, Chamber of Commerce of the United States of America, 1615 H Street, N.W., Washington, D.C. 20006.

Respondent's Appendix.

Interrogatory No. 11(b):

The Chamber has no knowledge or information sufficient to respond to Interrogatory 11(b). The program or procedure referred to in response to Interrogatory 10 was performed on an "in-house" basis and no breakdown was made with respect to the amount of money expended by the Chamber for such program or procedure.

Interrogatory No. 12:

None.

Interrogatories Nos. 13, 15, 17, 19, 21 and 22:

In response to Interrogatories Nos. 13, 15, 17, 19, 21, and 22, the Chamber has no knowledge of any of the information requested therein except that which is contained in the affidavit of Herbert Northrup and study of Armand Thiebolt.

Interrogatory No. 20:

No.

Respondent's Appendix.

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November 11, 1974

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

Respondent's Appendix.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Misc. No. 75-8017.

GRINNELL CORPORATION,
Plaintiff,
v.
MARY C. HACKETT ETC., ET AL.,
Defendants, Appellees,

THE CHAMBER OF COMMERCE OF THE UNITED STATES ET AL.,

Before COFFIN, Chief Judge,
MCENTEE and CAMPBELL, Circuit Judges.

Memorandum and Order
Entered March 7, 1975

Having considered the memoranda filed by the parties, we are of the opinion that enforcement of the district court's discovery order should no longer be stayed. In making this determination we have evaluated the likelihood that appellant will ultimately prevail despite the difficult hurdles which it faces, both as to jurisdiction and on the merits, and have endeavored to predict how our disposition of the stay request will affect the parties and the public interest. We are confident that the district court will remain sensitive to appellants' legitimate protective needs. The temporary stay granted by this court is hereby dissolved.

By the Court:
/s/ DANA H. GALLUP
Clerk.

[Cert. c. Clerk, U.S.D.C., R.I.; cc: Messrs. Joy, Pyle, Vetter, Rubinstein and Attorney General, R.I.]

Respondent's Appendix.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 75-1083.

GRINNELL CORPORATION,
Plaintiff, Appellee,
v.
MARY C. HACKETT,
Defendant, Appellee,

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE GREATER PROVIDENCE CHAMBER OF COMMERCE,
Plaintiff-Intervenors, Appellants.

Before COFFIN, Chief Judge,
MCENTEE and CAMPBELL, Circuit Judges.

ORDER OF COURT

Entered September 9, 1975

The petition for rehearing filed August 11, 1975, is hereby denied.

By the Court:

/s/ DANA H. GALLUP
Clerk.

[cc: Messrs. Smetana and Milasich.]